CORRECTED

No. 15,824

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH BONNEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF OF APPELLEE.

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JURISDICTIONAL STATEMENT.

Appellant was convicted in the District Court for the District of Alaska, First Judicial Division, at Ketchikan, the Honorable Raymond J. Kelly presiding, after a jury trial and verdicts of guilty on three counts of the crime of Obtaining Money by False Pretenses. A sentence of two years imprisonment on each count was imposed, with the provision that eighteen months of each sentence be suspended on certain conditions, and that the sentences be served concurrently. Appellant filed notice of appeal from the judgments and sentences imposed by the court.

Jurisdiction below was based upon 48 U.S.C. § 101, and in this court is based upon 28 U.S.C. § 1291.

STATEMENT OF CASE.

The only errors claimed by the appellant in this case are the denials of his motion to dismiss the indictment as failing to state a crime and his subsequent motion for re-argument and reconsideration of that matter. Without repeating the three rather lengthy counts of the indictment, they may be summarized as charging the appellant with obtaining money by falsely representing his intention at the time of soliciting clothing orders. The indictment charged that in each of the three instances the appellant did not intend to forward the clothing orders to tailoring houses, contrary to the intention he conveyed to his customers.

The appellant's motion to dismiss was based upon the premise that the implied intention of performance was merely a promise to do something in the future and therefore did not come within the scope of a false pretense. The trial court denied the motion on the grounds that the legislative intent was to prohibit the obtaining of property by falsely representing present intention.

Therefore, a single issue is presented to this court: Can a false statement of intention constitute a false pretense within the meaning of Sec. 65-5-81, ACLA 1949?[1]

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[1] "65-5-81. Obtaining Money or Property by False Pretenses. That if any person shall, by any false pretenses or by any privy or false token, and with intent to defraud, obtain, or attempt to obtain, from any other person any money or property whatever, . . . such person, upon conviction thereof, shall be punished . . ."

SUMMARY OF ARGUMENT.

A misrepresentation of present intention is a misrepresentation of an existing fact, and is a false pretense within the meaning of the Alaska Statute.

(1) The exclusion of a misrepresentation of present intent from false pretenses is traceable to a misinterpretation of the original statute defining the crime of obtaining money by false pretenses.

(2) There is no logical basis for making a distinction between a state of mind and other present facts, with regard to false pretenses.

(3) There are no special circumstances or practical considerations which require that misrepresentation of a state of mind be treated differently than misrepresentation of other existing facts.

(4) There are a substantial number of well-reasoned cases in accord with the holding of the trial court in the case at bar.

(5) The Ninth Circuit, Oregon, and Alaska cases cited by appellant did not involve the situation now before the court. The case is one of first impression in this jurisdiction.

(6) The trial court's ruling is logically and practically sound. No error has been shown.

ARGUMENT.

A MISREPRESENTATION OF PRESENT INTENTION IS A MISREPRESENTATION OF AN EXISTING FACT, AND IS A FALSE PRETENSE WITHIN THE MEANING OF THE ALASKA STATUTE.

The government concedes that the majority of jurisdictions hold that false promises, however fraudulent, relate to the future rather than to past or existing facts and therefore do not fall within the scope of "false pretenses." However, an examination of the majority rule shows it to be neither historically nor logically sound.

(1) The exclusion of a misrepresentation of present intent from false pretenses is traceable to a misinterpretation of the original statute defining the crime of obtaining money by false pretenses.

In an excellent article, *Theft by False Promises,* 101 U. of Pa. L. Rev. 967, 968-978, Arthur R. Pearce has analyzed the early cases decided under the forerunner of present day false pretense statutes, 30 Geo. II, Ch. 24 (1757). The statute provided punishment for "all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person . . . money, goods, wares, or merchandizes, with intent to cheat or defraud any person . . . " Prior to that time a somewhat related crime involving fraud was the common law offense of cheating, which required a showing that the fraud was effected by some material device or token against which common prudence and caution could not guard.

The first instance of an attempt to make a distinction between false statements concerning the past,

present and future under the new statute is found in *Rex v. Young,* 3 Durn. & E. 98 (1789). The defendant was charged with obtaining money by false pretenses, having fraudulently induced one Thomas to pay for a share of a bet on a race which was to be run shortly, and was a "sure thing.' The jury returned a verdict of not guilty and the case was taken to the King's Bench on a writ of error. In arguing the appeal, counsel for the Appellant contended:

> "Where the representation is of a thing *past* or *present,* against which caution cannot guard, it may come within the statute but if it be a representation of some future transaction, concerning which enquiries may be made, it is not an indictable offense under this statute, but is only the subject of a civil remedy; because the party can only be imposed upon through his own negligence."
>
> 3 Durn. & E. at p. 100.

The argument was an attempt to carry into the new statute a limitation that the fraud be one against which common caution could not guard, and assumed that any false pretense relating to the future could be guarded against by common caution. However, the court was unanimous in rejecting the argument and it held that the statute created a new offense which was broader than common law cheating.

The Law Review article also cites an opposite result which was reached in 1821 in *Rex v. Goodhall,* Russ. & Ry. 461, 168 Eng. Rep. 898. That case, however, was from a lower court, which was incapable of over-

ruling the decision of the King's Bench in *Rex v. Young.* Goodhall had ordered a quantity of meat, and, upon the arrival of the delivery boy, persuaded him to leave the meat and deliver a message to his master that he had a note which he would give as payment if the master would send back the proper change. Goodhall never did pay the debt and was prosecuted for obtaining property by false pretenses. Following a verdict of "guilty," the trial Judge reserved judgment and submitted the case for the consideration of the entire bench. Apparently no argument of the case was had before the judges, and in reaching the conclusion that the facts did not bring the case within the crime of obtaining property by false pretenses, Professor Pearce is of the opinion that they overlooked the prior ruling of the King's Bench in *Rex v. Young.* The reason given in *Rex v. Goodhall* for reversing the conviction was that "it was merely a promise for future conduct, and common prudence and caution would have prevented any injury arising from it." Russ & Ry. 461, 463, 168 Eng. Rep. 898, 899.

Pearce views *Rex v. Young* as the King's men marching up the hill, but in *Rex v. Goodhall* he observes that they marched back down again. "It was not the same men; it appears that they did not even know it was the same hill . . . " *Theft by False Promises,* 101 U. of Pa. L. Rev. 967, 972.

Several leading writers on the English criminal law of this period, recognized the holding of *Rex v. Young* to be a correct statement of the law relating to false pretenses, and confined *Rex v. Goodhall* to its

particular facts. They asserted that it is no objection that the false pretense relates to some event to take place at a future time. Roscoe, *Digest of the Law of Evidence in Criminal Cases,* 418 (2d Am. Ed. 1840); Archbold, *Pleading and Evidence in Criminal Cases,* 183 (3d Ed. 1828). However, another writer on Criminal Law, Wharton, seemingly made the same oversight as the court in *Rex v. Goodhall,* and stated:

> "In the first place, it will be noticed that the false pretences, to be within the statute, must relate to a state of things averred to be at the time existing, and not to a state of things thereafter to exist."
>
> "A pretence that the party would do an act that he did not have mean to do (as a pretence that he would pay for goods on delivery) was holden by all the judges not to be a false pretence, within the statute of George 2 [citing *Rex v. Goodhall*]; and the same rule is distinctly recognized in Massachusetts. *Commonwealth v. Drew,* 19 Pick. 179 (Mass. 1837)."
>
> Wharton, *American Criminal Law,* 543 (1st ed. 1846).

The Massachusetts decision cited by Wharton in turn relies upon *Rex v. Goodhall* in holding that "The pretence must relate to past events. Any representation or assurance in relation to a future transaction, may be a promise or covenant or warranty, but cannot amount to a statutory false pretence." (19 Pick. 179, 185.)

Thereafter the rule enunciated by *Rex v. Goodhall, Commonwealth v. Drew* and Wharton spread to the

majority of the states as settled law on the subject, with little independent examination of the reasoning behind it.

The situation today is one in which American courts have mechanically followed an earlier misconception which should be abandoned and has been abandoned by some of the courts from which the supposed rule was adopted.

(2) There is no logical basis for making a distinction between a state of mind and other present facts, with regard to false pretenses.

It is hardly disputable that the state of a man's mind is a fact, and that it can be the subject of a misrepresentation. When such misrepresentation occurs, it relates to an existing fact as clearly as if the false statement had referred to the quantity, quality, or ownership of concrete objects. The fact that in one instance the falsely represented thing is a material object and in the other it is an abstract thing does not make them essentially different. They are present facts in each instance, and are identical in both their illegal purpose and their effectiveness in perpetrating a fraud.

No distinction has ever entered the analogous area of the civil law relating to tort actions for deceit. One who fraudulently misrepresents to another that he or a third person intends to do or not to do a particular thing is civilly liable to a person who justifiably relies on the misrepresentation and is injured thereby. *Restatement of Torts,* Sec. 530. The author appropriately

states in comment (a), under the cited section, that "the state of a man's mind is as much a fact as the state of his digestion."

Judge Edgerton's dissenting opinion in the case of *Chaplin v. United States,* D.C. Cir., 1946, 157 F2d 697, 699-701, is also noteworthy in this regard.

> " . . . No doubt a promise is commonly an undertaking, but it is always an assertion of a present intention to perform. 'I will' means among other things 'I intend to.' It is so understood and it is meant to be so understood. Intention is a fact and present intention is a present fact. A promise made without an intention to perform is therefore a false statement about a present fact. This factual and declarative aspect of a promise is not a new discovery. It has come to be widely recognized in civil actions for deceit.
>
> In criminal cases most courts and text writers have clung to an old illusion that the same words cannot embody both a promise and a statement of fact. But this tradition that in a criminal case 'the statement of an intention is not a statement of an existing fact' has begun to break down."

(3) There are no special circumstances or practical considerations which require that misrepresentation of a state of mind be treated differently than misrepresentation of other existing facts.

Judge Clark cites the danger of injustice in prosecuting acts "as consonant with ordinary commercial default as with criminal conduct" in *Chaplin v. United States,* 157 F2d 697, 698-699. His reasoning is quoted in appellant's brief (pp. 9-11). But the fal-

lacy of the majority opinion is forcefully brought out in Judge Edgerton's dissent, 157 F2d 697, 701:

> "The court's picture of a flood of indictments against honest businessmen is unconvincing. No such flood has been observed in the few jurisdictions which have adopted the modern rule. It is true that innocent men are sometimes accused of crime. Innocent men have been convicted of murder. As long as rape is a crime, intercourse which is actually voluntary or even entirely imaginary will sometimes be charged and even punished as rape. Since it is impossible to prevent occasional miscarriage of justice, every criminal statute jeopardizes innocent people in some degree. The court suggests that the law should not jeopardize legitimate business. But this is the unavoidable price of public protection against illegitimate business. If the suggestion is sound the anti-trust law, the pure food law, the child labor law, the law against receiving stolen goods, and many others should be repealed, for malicious and damaging charges and erroneous convictions are possible under all of them."

Pearce reports in his previously cited article, 101 U. of Pa. L. Rev. 967, at 1007, that replies to inquiries sent to Better Business Bureaus in nine major cities of five states which follow the minority view, either by judicial construction or by statute, brought a unanimous denial of knowledge that the evils mentioned by Judge Clark in the *Chaplin* case actually exist. The "flood of complaints" has failed to materialize.

Furthermore, Judge Clark's reasoning necessarily conflicts with the judgment of Congress in enacting

the Federal Mail Fraud Statute,[2] 17 Stat. 283, 323 (1872) and the Supreme Court's construction of that Statute in *Durland v. United States,* 161 U. S. 306 (1896). In its original wording, the statute applied to the use of the mails in the execution of "any scheme or artifice to defraud." The government submits that this language is no more suggestive of false promises than is "any false pretenses," as found in the statute now in use, but nevertheless Congress rejected the argument that only false statements as to past or existing facts were contemplated, and held that "Some schemes may be promoted through mere misrepresentations and promises as to the future, yet are nonetheless schemes and artifices to defraud." 161 U. S. at p. 313. It was only by the amendment of 1909 (35 Stat. 1130), in which Congress adopted the construction of the *Durland* case, that the Act unequivocally was made applicable to all false representations, whether past, existing or future. It then read:

> " . . . whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises . . . "

Whatever conclusion might be taken from the interpretation of the original Mail Fraud Act in the *Durland* case, one fact is inescapable—that neither Congress nor the Supreme Court regarded the danger of unjust convictions so great that the defrauding of

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[2] 18 U.S.C. 1341, 1342.

others by falsely representing one's intention should be entirely free from prosecution. The same may be said of the legislatures in those states which, although they subscribe to the majority rule, have broadened their criminal fraud provisions by statute to include false promises. See:

Nebraska Rev. Stat., 28-1207 (Supp. 1947);

New Jersey Stat. Ann., 2A:111-1 (1952);

State v. Kaufman, 18 N.J. 75, 112 A (2d) 721 (1955);

Gen. Code of Ohio, Sec. 12447-1;

State v. Singleton, 85 Ohio App. 245, 87 NE (2d) 358 (1949);

La. Stat. Ann., Rev. Stat. 14:67 (1942);

State v. Dabbs, 228 La. 960, 84 So. (2d) 601 (1955).

Even counsel for the appellant shows no particular aversion to the punishing of fraud by false promises, provided it is made criminal by statute. (Appellant's brief, pp. 12, 16.)

The threat of injustice is clearly a rationalization rather than a valid reason for excluding misrepresentation of a state of mind from false pretenses. The burden on the prosecution to prove its case beyond a reasonable doubt is an adequate safeguard for those who innocently become unable to fulfill the terms of their contracts. In a civil action for deceit, the intention of the promisor not to perform a contract cannot be established solely by proof of its non-performance. Restatement of Torts, Sec. 530, comment (c). *A fortiori,* criminal prosecutions for defrauding by false

promises could not result in conviction without substantial independent evidence of a fraudulent intent.

(4) There are a substantial number of well-reasoned cases in accord with the holding of the trial court in the case at bar.

In support of the interpretation of "false pretenses" advocated by the government and adopted by the trial court in this case, reliance is placed on the reasoning in decisions of the Supreme Courts of California, Rhode Island, and Massachusetts, the latter state having retreated from its original position in *Commonwealth v. Drew, supra.*

The leading case in California is *People v. Ashley,* 42 Cal. 2d 246, 267 P2d 271; cert. denied 348 U.S. 900. Defendant, the business manager of "Life's Estate, Ltd.," a corporation chartered for the purpose of "introducing people," was convicted of grand theft under Sec. 484 of the California Penal Code, which section includes the offense of defrauding a person "by any false or fraudulent representation or pretense." He was specifically charged with defrauding two women of the total sum of $25,260 by inducing them to make loans to Life's Estate under the misrepresentation that he intended to use the money for purchasing a theatre. Both women were assured that they would be given adequate security. In each instance, however, no security was in fact given, and the loans were used to pay the operating expenses of the corporation.

The Supreme Court ruled that the misrepresentations of intention were false pretenses and affirmed the conviction. The decision contains a valuable discus-

sion of the merits of the two views. 267 P.2d 271, 279-283.

The two California cases cited by the appellant, (p. 12, appellant's brief) require a brief comment. *People v. Weitz* (Cal. App. 1953) 255 P.2d 40, a decision of the Third District Court of Appeal supported the appellant's contentions and held that false statements of intent were not false pretenses, but the Supreme Court of California in affirming the conviction, disapproved this ruling and cited its decision in the *Ashley* case. 267 P.2d 295, 298; certiorari denied 347 U. S. 993.

In the second case, *People v. Ames,* (Cal. App. 1943) 143 P.2d 92, the government contends that the appellant is mistaken in interpreting the misrepresentations to be a combination of past and existing facts and statements of intention. An examination of the facts reveals that only statements of intention were involved.

In *State v. McMahon,* 49 R. I. 107, 140 A. 359 (1929), the defendant was accused of fraudulently contracting for the purchase of cars on six different occasions between August and October, 1926, in each instance making a small down payment and giving a 60 or 90-day note for the balance of the purchase price, which was not paid. The jury concluded from the evidence that the defendant had no intention of performing the contracts at the time he entered into them, and the Supreme Court of R. I. affirmed the conviction, stating:

> "This state is committed to the doctrine that in an action for deceit, intention not to meet a future obligation is a question of fact to be submitted to the jury, and that misrepresentation of a present state of mind as to such intention is a false representation of an existing fact."

Among the Massachusetts cases, *Commonwealth v. Morrison,* 252 Mass. 116, 147 N.E. 588 (1925), involved a scheme whereby one member of a conspiracy offered a merchant some samples of an obsolete spark plug, representing them to be of merchantable quality. A second conspirator placed an order for a quantity of the spark plugs to be delivered C.O.D. to an address in another city, thus inducing the merchant to purchase the spark plugs from the first conspirator. The first conspirator then supplied the merchant's needs and received cash payment. The C.O.D. shipment was subsequently returned unclaimed, and the defendants were prosecuted for obtaining money by false pretenses. Following a conviction the Supreme Court affirmed and stated:

> "When a person enters into a contract to buy goods, he impliedly represents that he intends to make a genuine contract; if such is not his intentions, he may be found to have made a false representation . . . " 147 N.E. 588, 590.

The same court later observed in the case of *Commonwealth v. McKnight,* 289 Mass. 530, 195 N.E. 499, 506, appeal dismissed 296 U. S. 660, that:

> "The definition of a false pretense . . . is a representation of some fact or circumstance cal-

culated to mislead which is not true. A man's intention is a matter of fact, and may be proved as such."

The most recent Massachusetts case is *Commonwealth v. Green,* 326 Mass. 344, 94 N.E. (2d) 260 (1950), wherein the defendant was charged with having solicited funds for a proposed investment trust, but with the actual intention of converting the money to his own use. In affirming a conviction, the court held:

"The representations that the moneys contributed were to be invested in this fund were statements of fact as to the intention of those collecting for the fund."

(5) The Ninth Circuit, Oregon, and Alaska cases cited by appellant did not involve the situation now before the court. The case is one of first impression in this jurisdiction.

The cases which appellant cites as persuasive authority for the adoption of the majority rule in this jurisdiction are easily distinguishable, and serve to emphasize the difference between falsely representing one's present intention and merely stating an opinion concerning a future event.

The indictment in *United States v. Pearce,* 7 Alaska 246 (1924) charged that in May, 1923, Edward E. Pearce falsely represented to Robinson & Greenberg, a mercantile copartnership, that he had sufficient funds on deposit with the Miners & Merchants Bank of Alaska to pay for all goods which he *might* order during the 1923 mining season. Obviously the statement amounted to a prediction that the amount on

deposit would be sufficient, and it was contingent on the quantity of goods he ordered in the future. The court was unquestionably correct in dismissing the indictment.

Biddle v. United States, 9 Cir. 1907, 156 Fed. 759, arose in the United States District Court for China. The defendant contracted to rent the second floor of a certain building to others for the purpose of gambling during the autumn race meeting of 1906 in Shanghai. One of the assurances made by the defendant was that the games would be allowed to operate, although in fact there was a municipal ordinance against gambling in Shanghai at that time. The defendant obtained the rent, but his efforts to have the ordinance suspended were not successful. There was no representation that the ordinance had been suspended or revoked, however. The conviction was set aside because the defendant's promise was nothing more than a prediction.

The case of *State v. Leonard,* 73 Ore. 451, 144 Pac. 113 (1914), applying the Oregon statute from which 65-5-81, ACLA 1949, was taken, did not involve false promises or statements of intention. The defendant, who owned a remote tract of barren land, procured one O'Donovan to execute a $4,500 note and mortgage which recited that it constituted half the purchase price of the property. He then falsely represented to one Denney that he had recently sold the land for $9,000, and that the property had such improvements as a house and an orchard, thereby inducing Denney to exchange a more valuable piece of property for the

note and mortgage. The jury returned a verdict of guilty and the conviction was affirmed by the Supreme Court. Therefore, the statement quoted from this case at p. 15 of appellant's brief is only *obiter dicta* in nature.

(6) The trial court's ruling is logically and practically sound. No error has been shown.

In adopting the view that a false statement of intention is a false pretense, the trial court made a policy choice which is logically sound and supported by strong practical reasons. In addition, it had the advantage of deciding the issue in the full light of the local circumstances.

Error is not to be presumed, but must be affirmatively shown by the appellant, and the government submits that nothing more has been shown than the fact that more jurisdictions are contrary to the trial court than are in accord with it on this particular matter. Every intendment should be in favor of the lower court's judgment.

Merryman v. Bourne, 76 U.S. 592, 600 (1869);
Hardt v. Kirkpatrick, 9 Cir., 1937, 91 F.2d 875, 878, cert. den. 303 U. S. 626.

CONCLUSION.

Misrepresentation of present intent is a misrepresentation of an existing fact, and therefore it is within the purview of 65-5-81 ACLA 1949, defining the crime of Obtaining Money by False Pretenses. The trial

court was correct in refusing to dismiss the Indictment, and the judgment of conviction should be affirmed.

Dated, Juneau, Alaska,
February 10, 1958.

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